BRIEF FOR RESPONDENT, FEDERAL MARITIME COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,604

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

JAMES L. PIMPER
General Counsel

ROBERT N. KATZ
Solicitor

Federal Maritime Commission

Washington, D.C.
May 20, 1968

QUESTIONS PRESENTED

1. Whether an agreement to merge between two or more common carriers by water is an agreement subject to section 15 of the Shipping Act, 1916 (46 U.S.C. §814) which the Commission should approve or disapprove depending on its findings in connection therewith?

2. Whether there was sufficient basis for the Commission in the exercise of its administrative discretion to grant approval of Agreement No. 9551?

INDEX

CASE	PAGE(S)

TABLE OF AUTHORITIES

OTHER AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This is a petition to review a supplemental report of the Federal Maritime Commission (Commission) issued and served on December 26, 1967, pursuant to the Shipping Act, 1916, c. 451, 39 Stat. 728, 46 U.S.C. §801 et seq. The order was issued in the Commission's Docket No. 66-45. Jurisdiction to review the Commission's order is conferred on this court pursuant to 28 U.S.C. §2341 et seq.

Prior to the issuance of the supplemental report here under review, the Commission issued a report, served on October 3, 1967, in which, by a three to two decision, the Commission held that an agreement for consolidation or merger was that type of agreement which is included within its jurisdiction provided by section 15 of the Shipping Act, 1916. At that time, however, the Commission decided that the proceeding should be remanded to the hearing examiner for the taking of further evidence.

On November 17, 1967, the Commission favorably considered a petition for reconsideration of the October 3 report. As a result of such reconsideration the supplemental report here under review was issued on December 26, 1967.

The Commission, in the supplemental report, adopted the hearing examiner's findings and conclusions in granting approval of Agreement No. 9551. That agreement provides for activities of American Mail Line, Ltd. (AML), American President Lines, Ltd. (APL) and Pacific Far East Lines, Inc. (PFEL) which lead to the consolidation or merger of the three. (R. Ex. 14, pp. 2-4). Each of the three are common carriers by water within the meaning

of the Shipping Act, 1916. Effective control of the three carriers is in the Natomas Company. (S.R.-5).

Under Delaware law, AML may be merged into APL pursuant to a "merger" procedure. Accordingly, Agreement No. 9551 is not essential to the merger of AML into APL. (S.R.-6).

The hearing examiner issued extensive findings concerning the services of the three companies and corporate structure, management, operations and financial conditions. In addition, he examined and reached findings concerning the benefits which might flow from a merger pursuant to Agreement No. 9551. The hearing examiner noted that there was no shipper or port testimony or argument for or against the merger. Other than opposition to the approval of Agreement No. 9551 on jurisdictional grounds, the only opposition to the merger came from States Steamship Lines and Matson Navigation Company. The examiner received extensive testimony and other evidence concerning the business of the carriers' opposing the merger, the potential impact of the merger upon these carriers, and the potential injury. The examiner considered antitrust principles as well as sound transportation justifications in arriving at a conclusion that the Agreement should be approved. He found that the merger would not tend to create a monopoly or lessen competition except for elimination of service competition among the three merging carriers and that ample competition would remain in the services. (S.R.-41). He further concluded from the record that substantial economies and efficiencies of scale would result from the proposed merger. The Commission in upholding approval of Agreement No. 9551 examined the record, the findings and conclusions of the hearing examiner and adopted

them as its own. No exceptions had been taken to the findings of fact upon which the examiner reached his conclusions.

The Commission's approval of Agreement No. 9551 was by a three to two decision. One commissioner dissented on the basis that jurisdiction did not lie under section 15 of the Shipping Act. The other commissioner dissented on the basis that the proceeding should have been remanded to the examiner for the taking of further evidence. Commissioner Fanseen, who had earlier voted against disapproval on the basis of lack of jurisdiction, voted on reconsideration to approve Agreement No. 9551 since three of his colleagues had concluded that the Commission would have jurisdiction to approve or disapprove Agreement No. 9551. Based upon that finding of jurisdiction Commissioner Fanseen felt that there was sufficient basis in the record for the Commission to grant approval to Agreement No. 9551.

SUMMARY OF ARGUMENT

The legislative history not only of the Shipping Act, 1916, but also of amendments to section 7 of the Clayton Act and later amendments to the Shipping Act, 1916, all support the conclusion that Congress intended that merger agreements were the type of agreements which were subject to approval or disapproval pursuant to section 15 of the Shipping Act, 1916. The pronouncement of courts that exemptions from antitrust laws are not to be freely construed is not repudiated by this conclusion. It is clear that failure to comply with the Shipping Act, 1916 would expose parties subject thereto to remedies and sanctions provided by the antitrust laws as well as the Shipping Act, 1916. A reasonable interpretation of the statute herein involved leads only to the conclusion that mergers are among the types of agreements included within section 15. Ancillary issues raised by petitioner, Matson, are not germane to the proceeding before this court. Finally, the Commission, though not bound to adhere strictly to antitrust principles, examined the agreement herein involved, engaged in deep and penetrating analysis of the facts herein involved and examined these facts in the light of antitrust principles. There is ample evidence and basis in the record to support the Commission's conclusion. Accordingly, the order of the Commission should be affirmed.

ARGUMENT

Introduction

There is a valid basis upon which the Commission determined that this type of agreement was that which falls within section 15 of the Shipping Act, 1916 and is subject to approval or disapproval. The legislative history would verify this. A practical reading of the statute confirms a logical analysis that demands this conclusion. The Commission having jurisdiction to review this type of agreement and approve or disapprove it was justified in granting approval based upon the evidence before it. In the exercise of sound administrative discretion the Commission found ample justification for approving Agreement No. 9551.

I. LEGISLATIVE HISTORY OF SECTION 15, SHIPPING ACT, 1916 DOES NOT PRECLUDE REVIEW AND APPROVAL OF ANTICOMPETITIVE AGREEMENTS WHICH TAKE THE FORM OF MERGER AGREEMENTS.

The Shipping Act was passed following extensive hearings and extensive investigation by the House Committee on Merchant Marine and Fisheries (known as the Alexander Committee). The Committee was concerned that rate wars and other anticompetitive practices then prevalent or possible in the merchant marine industry would lead to ruinous competition which would ultimately be a creation of a monopoly as effective as that which could exist by agreement. (H.Doc. No. 805, 63d Cong., 2d Sess., p. 416). The fact that the Alexander Committee expressly indicated concern with creation of monopolies but did not outlaw monopolies in the maritime industry makes it clear

that the Committee intended that the FMC review anticompetitive agreements. Specific acts and practices were prohibited by the Alexander Committee, such practices including use of fighting ships, rebating, etc. It can reasonably be presumed that the Committee, by not outlawing merger agreements, intended to have such agreements approved by the Commission. The Department of Justice points out (D.J. Br. 27), that the Panama Canal Act of 1912 made it unlawful for any railroad to own, control or have interest plus stock ownership or otherwise in any common carrier by water operating through the Panama Canal or elsewhere with which the railroad may compete. The fact that mergers or common ownership were not outlawed in the Shipping Act, which so closely in time followed the Panama Canal Act, would indicate that the Congress, rather than not intending to include mergers under the Shipping Act merely intended not to outlaw mergers unequivocally. Had Congress intended that mergers not be subject to review by the Commission it would undoubtly have said so, since it provided for review of any and all anticompetitive devices. To argue that the silence of the Shipping Act on mergers indicates that Congress did not intend to include mergers under the Shipping Act is reading very much more into the statute than can reasonably be contemplated. Such failure to specifically mention mergers merely indicates that Congress concluded that mergers were an anticompetitive device.

Thus, the mere fact that the Alexander Committee was concerned with slowing down the movement toward consolidation cannot be a basis for concluding that the Commission, which was to review and control all other anticompetitive combinations, was not to apply its administrative expertise to the control of

mergers or consolidations. The Supreme Court has recognized that the Shipping Act of 1916 was intended to vest within the Commission the responsibility for pervasive control over anticompetitive conduct of an industry. Volkswagenwerk Aktiegesellschaft v. FMC and USA, et al., 390 U.S. 261 (1968), No. 69, decided March 6, 1968. The Department of Justice noted that in its brief before the Supreme Court in the Volkswagen case it pointed out (by way of footnote) that the FMC had no express authority to approve mergers. That same brief, however, urged successfully the submission to Commission scrutiny in advance of implementation all other agreements which present a Sherman Act question. In finding that the Commission should not take a restrictive view of its jurisdiction the Court clearly did not endorse the contention that the Commission did not have jurisdiction to approve mergers. Rather, the Court stated:

> "The Commission thus took an extremely narrow view of a statute that uses expansive language. In support of that view, the Commission argued in this Court that a narrow construction of §15 should be adopted in order to minimize the number of agreements that may receive antitrust exemption. However, antitrust exemption results not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under §15 to consider antitrust implications. FMC v. Aktiebolaget Svenska Amerika Linien, post, at ___; see also Isbrandtsen v. United States, 211 F.2d 51.
>
> "The Commission itself has not heretofore limited §15 to horizontal agreements among competitors, but has applied it to other types of agreements coming within its literal terms. See, e.g., Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 5 F.M.B. 648 (1959), affirmed, 287 F.2d 86, and Agreement No. T-4: Terminal Lease Agreement at Long Beach, California, 8 F.M.C. 521 (1965), applying §15 to lease agreements. In the latter case, decided only four months before its decision in the case before us, the Commission said:

> 'Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act. Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.' 8 F.M.C., at 531.
>
> "To limit §15 to agreements that 'affect competition,' as the Commission used that phrase in the present case, simply does not square with the structure of the statute." (Footnotes omitted).

It is argued that the decision in Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966), supports the proposition that antitrust laws supersede the Shipping Act, 1916. This is simply not so. Carnation merely holds that in the event that parties subject to the Shipping Act of 1916 do not comply with the provisions of that Act they will not only be subject to the penalties provided by that Act but, not having perfected an antitrust exemption, will also be subject to the penalties provided by the antitrust laws. This does not verify a narrow reading of the jurisdiction granted by Congress in enacting section 15 and does not bear upon the issue here.

The legislative history which most directly deals with this issue is found in the history of the 1949 amendments to section 7 of the Clayton Act, 15 U.S.C. 18.

In 1949, Congress was taking steps to plug the loopholes in section 7 so as to bring within its scope the entire range of corporate amalgamations, including assets, acquisitions, and mergers, as well as the stock acquisitions, which alone had been covered. Between 1914, when the section was originally enacted, and 1949, several

agencies had been created or given additional authority. These included the Civil Aeronautics Board, the Federal Communications Commission and the Federal Power Commission, as well as the Federal Maritime Commission's predecessors; and the Interstate Commerce Act had been amended to cover mergers and acquisitions of control (49 U.S.C. 5). To make it clear that the amendment of section 7 would not affect the authority of these agencies over mergers, the following was added to section 7:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

In the version first passed by the House, the amending bill (H.R. 2734) omitted reference to the Commission's predecessor. Under date of September 29, 1949, the Commission, by its Vice Chairman, called this omission to the attention of the Senate Committee.[1/] After stating the Commission's understanding that the Clayton Act amendment would prohibit certain asset

---

1/ "The attention of the Maritime Commission has been called to the provisions of the bill H.R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency. (Footnote continued on next page).

acquisitions, the letter described the provisions of section 15 of the Act with respect to the filing and approval or disapproval by the Commission of any agreement among carriers or other persons subject to the Act "if such agreement, among other things, is one 'controlling, regulating, preventing, or destroying competition;'" and noted that approved agreements were expected from the antitrust laws. A copy of the pertinent provisions of section 15 was attached. The letter suggested that the Commission be included among the agencies specifically listed in H.R. 2734. It noted that H.R. 2734 did not appear to affect the section 15 exemption provision, but suggested that inclusion of the Commission among the agencies mentioned would avoid controversy arising from any contention that failure to do so made approved section 15 agreements subject to the provisions of section 7

1/ Continued:

"Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other person subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement among other things, is one 'controlling, regulating, preventing or destroying competition'. The Commission has authority to disapprove any such agreement 'that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment to the commerce of the United States, or to be in violation of this Act.' Agreements approved by the Commission under this provision are 'excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 and 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes', and amendments and Acts supplementary thereto' (commonly referred to as anti-trust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference."

of the Clayton Act. Obviously such agreements could not be subject to section 7 unless they were merger agreements of one kind or another.

The Senate Committee thereupon amended H.R. 2734 to include the Commission among the agencies listed in the above quoted paragraph of section 7. In its Report No. 1775 (81st Cong., 2d Sess., June 2, 1950), the Committee on the Judiciary noted (p. 2):

> "The purpose of the amendments is to include in the bill the recommendations of the United States Maritime Commission and the Securities and Exchange Commission, which the committee believe to be justified. . . ."

The Committee's Report also noted (p. 7):

> "The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess."

Of course, the amendment did not add to the Commission's jurisdiction nor, as the letter made clear, did the Commission expect it to. Thus, Congress was aware that the Commission claimed such jurisdiction under section 15 in a carefully prepared and documented letter. Congress thought the inclusion of the Commission in section 7 to be "justified" and has not seen fit to change its position since then. But it is argued that any reliance of section 7 for merger jurisdiction is misplaced and that Congress, in at least two instances, included agencies in section 7 which were later determined by the Supreme Court to have no such jurisdiction. See Milk Producers Assn. v. US, 362 U.S. 169 (1961) and California v. Fed. Power Comm'n., 369 U.S. 482 (1962).

In Milk Producers, there was no statutory provisions vesting power in the Secretary of Agriculture to approve the transaction in question and thus immunize it from the antitrust laws. In the California case, while the Power Commission had the statutory authority to approve the acquisition of one natural gas company by another, its approval did not exempt the transaction from the antitrust laws. The Supreme Court in that case simply held that the Commission should have stayed its hand and not acted during the pendency of an antitrust suit in the district court over the same transaction. Mergers, as agreements requiring approval under section 15 are, upon such approval, expressly exempted from the provisions of the antitrust by the language of that section.

In 1956, the Federal Maritime Board, advised the Senate Subcommittee on Antitrust and Monopoly that "merger agreements approved by the Board . . . and the resulting mergers, are exempt from section 7." 2/ In 1962, the Chairman of the Commission reported to the Antitrust Subcommittee of the House Judiciary Committee that "section 15 and our decision in the Isbrandtsen-Export merger case constituted notice that merger agreements must be filed with the Commission and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval." 3/ It may be noted that the "Celler Report" issued in March 1962,

---

2/ Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

3/ Progress Report, Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 87th Cong., 2d Sess., (1962) at 1.

referred to the AEIL transaction recently approved by the Federal Maritime Commission without questioning the Commission's jurisdiction. 4/

II. EXCLUDING MERGERS FROM THAT TYPE OF AGREEMENT WHICH MUST BE SUBJECTED TO SCRUTINY UNDER SECTION 15 WOULD BE TO ELIMINATE MEANINGFUL REGULATION.

While Congress viewed joint rate making as a lesser evil than situations which might otherwise occur it did not find mergers illegal per se, and it did not exclude mergers from section 15. Thus, while Congress may have sought to forestall the need for mergers it did not intend to leave mergers outside the pale of administrative regulatory surveillance.

The petitioner and Department of Justice urge that section 15 is directed only to that type of agreement which contemplates the continued existence of the parties as separate entities, that jurisdiction to maintain continued surveillance over the agreement is essential. The fact is that continual surveillance exists. The rates and tariffs of the carriers are filed. Their services and practices are made public. In the event that an abuse should later result from the merger the Commission is not powerless to act. It can find rates unjustified pursuant to section 18 of the Shipping Act, 46 U.S.C. 817. 5/ Any concern that may arise because of a merger is dispelled

---

4/ The Ocean Freight Industry; Report of the Antitrust Subcommittee, House Report No. 1419, 87th Cong., 2d Sess., p. 47.

5/ This section provides in part:

> "Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

y the availability of the continued surveillance.

If the plain words of the statute are ignored and merger agreements re not construed as that type of agreement which falls within section 15 f the Shipping Act, 1916, the situation could conceivably arrive wherein arties who have an agreement properly rejected or disapproved by the Com- ission pursuant to standards applicable to section 15 would have available major loophole to accomplish their ultimate goal. Rather than enter into cost sharing or profit sharing agreement which the Commission would dis- pprove the parties could simply merge. This merger may or may not subse- uently be held to be unlawful under the standards of the Sherman Act and layton Act. But clearly, the jurisdiction and expertise of the Commission ill have been denied. It is inconceivable that Congress would desire pplication of agency expertise to a given industry and then provide such major loophole for the parties regulated. A merger between two small ompanies could be extremely damaging to a given trade route or a certain egment of the shipping public. Yet, by the standards applicable under he antitrust laws the Department of Justice may feel that seeking to set side the merger would be inappropriate. It is obvious that transportation enefits and the policies set forth by Congress in enacting the Shipping ct, 1916 would thus be defeated.

II. JURISDICTION OVER FOREIGN MERGERS IS NOT GERMANE TO THE ISSUE BEFORE THIS COURT.

Petitioner argues that jurisdiction over approval or disapproval of ergers should be denied because section 15 makes no distinction between

flag or nationality among carriers subject to its requirement. The petitioner expresses concern that the Commission might exercise regulatory jurisdiction permissively in view of foreign flag mergers over which the Commission might not exercise jurisdiction. This argument does violence to the language of section 15 and to the long established concern of the Commission for equality of treatment under the Shipping Act regardless of flag.

Section 17, for example, relating to regulation of terminal practices makes no distinction between domestic terminals and foreign terminals. Although the Commission does not exercise regulatory supervision over practices of foreign terminals it has yet to be accused of being permissive in its regulation of domestic terminals. The Commission has been concerned as previously stated that it afford equal treatment to all carriers regardless of flag. However, subjecting an agreement to merge between American flag carriers to administrative scrutiny and regulation under section 15 is not affording unequal treatment to foreign flag carriers. There has been no showing that this would impose an undue burden on domestic carriers. To assert the foregoing as a reason for denying jurisdiction is indeed stretching for an argument.

IV. THE COMMISSION APPLIED PROPER STANDARDS IN GRANTING APPROVAL OF THE MERGER AGREEMENT AND ITS ADMINISTRATIVE EXPERTISE SHOULD NOT BE DISPLACED.

The Commission noted that no exceptions were taken to the findings of fact upon which the examiner based his conclusion to approve the agreement to merge. The examiner found that the merger would have a pro-competitive,

rather than anti-competitive, effect. The examiner found that the record did not demonstrate any probability that the proposed merger would stifle or substantially attenuate the competition of States Steamship Company, nor did the examiner find any probability whatever that the proposed merger would have any injurious impact upon plans of Matson Navigation Company, as presented to the examiner.

The petitioner has presumed that mergers are illegal *per se*. That is simply not so. The petitioner also presumes that all mergers are destructive of competition. Again, that is simply not so. There were facts presented in this matter which tended to show that the merger might be pro-competitive in effect. The examiner made a deep and extensive analysis of the market, elasticity of demand, the consumer and competition, as well as an analysis of the "public interest."

The Commission was not unaware of antitrust principles. The Commission and examiner were aware of the nature of the industry involved. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). The Commission accordingly found that the significance of the merging companies' share of the market was diminished considerably by the nature of the industry involved and by the fact of continued surveillance and regulation. The Commission also considered the fact that it has long been recognized that there is ease of entry into the steamship trade competition.[6/] Notwithstanding the extensive analysis of the proposed merger in light of the standards of antitrust laws,

---

6/ Index to the Legislative History of the Steamship Conference Dual Rate Law. S.Doc. No. 100, 87th Cong., 2d Sess. 1961.

the Commission though it did so, was not compelled to adhere to antitrust law standards. That strict adherence to antitrust law standards is not required in transportation industry mergers was established by the decision of the Supreme Court in <u>Florida East Coast Ry. Co.</u> v. <u>United States</u>, 386 U.S. 544 (1967). See also <u>McLean Trucking Co.</u> v. <u>United States</u>, 321 U.S. 67 (1944).

The conclusions of the Commission were derived from extensive evidence and upon findings of fact to which no exceptions were taken. The Commission's expertise was employed in an extremely complex analysis and its conclusions based thereon must not be supplemented. The substantial evidence considered by the Commission supports its conclusion that the merger agreement should be approved. The Supreme Court has spelled out the premium placed upon agency expertise many times. This was done specifically with respect to the Federal Maritime Commission in the case of <u>Consolo</u> v. <u>Federal Maritime Commission</u>, 386 U.S. 607, 619-621 (1966), as follows:

> "Section 10(e) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. §1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' Cf. <u>United States</u> v. <u>Interstate Commerce Comm'n</u>, 91 U.S.App.D.C. 178, 183-184, 198 F.2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' <u>Consolidated Edison Co.</u> v. <u>Labor Board</u>, 305 U.S. 197, 229. '[i]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' <u>Labor Board</u> v. <u>Columbian Enameling & Stamping Co.</u>, 306 U.S. 292, 300. This is something less than the weight of the evidence, and the

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21.

"Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." See also Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Commission, 314 F.2d 928 (9th Cir. 1963) and Stockton Port District v. Federal Maritime Commission, 369 F.2d 380 (9th Cir. 1966), cert. denied, 386 U.S. 1031 (1967).

CONCLUSION

Denial of application of section 15 to merger agreements could result in a substantial anti-competitive activity completly escaping administrative regulatory scrutiny. While the merger here under review was found to be potentially pro-competitive rather than anti-competitive, situations could arise in which the lack of regulatory scrutiny could result in substantial injury to competition, competitors, and the shippers. Any regulatory review outside of the scope of section 15 of the Shipping Act would be in the absence of the agency expertise upon which Congress has placed a premium.

Accordingly, the Commission's conclusion has a reasonable basis in law. Its elaborate and complete decision is supported by substantial evidence and its conclusions have warrant in the record. Accordingly, the order of the Commission should be affirmed.

Respectfully submitted,

JAMES L. PIMPER
General Counsel

ROBERT N. KATZ
Solicitor

Washington, D.C.
May 20, 1968

No. 22604

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

UPON PETITION FOR REVIEW OF AN
ORDER OF THE FEDERAL MARITIME COMMISSION

BRIEF ON BEHALF OF THE UNITED STATES OF AMERICA

DONALD F. TURNER,
Assistant Attorney General,

HOWARD E. SHAPIRO,

IRWIN A. SEIBEL,
Attorneys,

Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22604

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

UPON PETITION FOR REVIEW OF AN
ORDER OF THE FEDERAL MARITIME COMMISSION

BRIEF ON BEHALF OF THE UNITED STATES OF AMERICA

The United States believes that the Federal Maritime Commission is in error as to one issue on review before this Court and takes no position as to the other. It is therefore filing its brief at approximately the same time as the petitioner, even though the United States is a party-respondent pursuant to 28 U.S.C. 2344.

STATEMENT

This case is before the Court on a petition filed by the Matson Navigation Company to review a final order of the Commission issued under the Shipping Act, 1916 (the Act), (46 U.S.C. §§ 801, et seq.). Jurisdiction of the Court rests on 28 U.S.C. 2342.

The order was entered upon the conclusion of an administrative proceeding instituted by the Commission for the purpose of investigating an agreement for consolidation or merger among three common carriers by water - American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc. All are intervenors in this Court.

The Commission, dividing 3 to 2, held that the agreement is the kind of agreement which is included within the Commission's jurisdiction under Section 15 of the Act (46 U.S.C. 814) and approved the agreement. If the agreement is within the scope of Section 15, the Commission's approval exempts it from the antitrust laws. See Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213; Volkswagenwerk v. Federal Maritime Commission, ____ U.S. _____, No. 69, decided March 6, 1968.

It is the view of the United States that the Commission erred in holding that merger agreements are subject to its jurisdiction pursuant to Section 15 and that it may therefore immunize such agreements from the antitrust laws. This brief will be limited to a statement of the position of the United States on that issue. The United States takes no position, however, on the issue of whether, if the Commission does have jurisdiction, the Commission's decision to approve the agreement was proper. 1/

1/ The Department of Justice intervened in the administrative proceeding also for the limited purpose of presenting its views on the issue of the Commission's jurisdiction to immunize merger agreements from the antitrust laws.

It is the view of the United States that the Commission erred in holding that merger agreements are subject to its jurisdiction pursuant to Section 15 and that it may therefore immunize such agreements from the antitrust laws. This brief will be limited to a statement of the position of the United States on that issue. The United States takes no position, however, on the issue of whether, if the Commission does have jurisdiction, the Commission's decision to approve the agreement was proper. 17/

17/ The Government's primary submission in this administration of procedures that the Interstate Commission of proceeding now views on the issue of the Commission's jurisdiction to immunize the merger agreements from the antitrust laws.

SUMMARY OF ARGUMENT

Because the antitrust laws reflect fundamental national economic policy, exceptions to those laws are narrowly construed and implied repeals are strongly disfavored. Accordingly, Congressional intent to immunize a class of transactions otherwise subject to those laws as, for example, corporate mergers, must be shown in unmistakable terms.

There is nothing in Section 15 which makes any reference to mergers. The language indicates rather an intention to deal only with cooperative working agreements.

Nor is there anything in the legislative history which indicates that mergers are to be included. On the contrary, it indicates an intention to permit joint rate-making and other cooperative agreements under government supervision as the lesser evil than the situation which would otherwise occur and which Congress believed could not be prevented: the lines would engage in rate wars and this in turn would result in the permanent loss of competition to the industry through failure or consolidation.

Other available guides of Congressional intent confirm that Congress did not mean to include mergers in Section 15. Where Congress intended to authorize other regulatory agencies (the I.C.C., C.A.B. and F.C.C.) to pass upon mergers, it did so in clear and specific language. The Interstate Commerce Act, for example, makes it lawful with approval of the Interstate Commerce Commission "to consolidate or merge" (49 U.S.C. 5(2)) and relieves "from the operation of the antitrust laws" the transaction so approved (49 U.S.C. 5(11)). The absence of an express grant to the Federal Maritime Commission strongly suggests the absence of such intention. Moreover, the silence of the Shipping Act, following so closely upon enactment of the Panama Canal Act of 1912 and the Clayton Act in 1914, both of which were directed in unmistakable terms at intercorporate combinations involving ownership, furnishes additional evidence of an intention not to include mergers in the Shipping Act.

ARGUMENT

Introduction

It is now settled that the Shipping Act does not grant the shipping industry a complete immunity from the antitrust laws. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 219-220. What was given was a "limited antitrust exemption," id. at 219; Federal Maritime Commission v. Svenska Amerika, ___ U.S. ___, Nos. 257 and 258, decided March 6, 1968. The basic issue presented by this case relates to the range of agreements which the Commission is authorized under Section 15 to approve and thereby to exempt from the antitrust laws.

There is no question that Section 15 empowers the Commission to immunize agreements providing for cooperative working arrangements among shipping lines. Volkswagenwerk v. Federal Maritime Commission, supra. The question here is whether this power extends to an agreement providing for a merger of such lines.

The differences between the two types of agreements are by no means inconsequential. Cooperative working

arrangements, which include conference agreements, pooling agreements, transshipment agreements, and joint service agreements (See Marx, International Shipping Cartels (1953), Ch. VIII), are negotiated between separate and independent lines. They are terminable, susceptible of modification in the event of changed conditions, and do not eliminate all competition between the parties. In the case of shipping conferences, for example, in which competing lines agree for the purpose of fixing rates and otherwise restricting competition, there may remain vigorous competition among the member lines. Marx, id., at pp. 3, 137, 250-251; Gorter, United States Shipping Policies (1956), p. 146.

> It is important to remember that shipping conferences are not combines linked by shareholdings or any other form of common ownership.* * * 'A shipping conference is a meeting in which competitors face one another with the object of achieving that minimum of co-operation which will suffice to prevent such chaotic competition as might render impractical the liner system of working ships. Each member of a conference is seeking the minimum surrender of his competitive freedom which is compatible with this object; his attitude in debate is determined by the sources of strength which lie behind his diplomacy.' [Citation omitted, Marx, id., at pp. 250-251.]

Merger agreements, on the other hand, result in the complete disappearance of one or more of the shipping lines as separate and independent entities and thus eliminate competition between the parties in all respects and on a permanent basis. Furthermore, the safeguard of modifying or disapproving cooperative working agreements, should changing conditions call for such a course, is wholly inappropriate in the case of a merger, for "where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock." United States v. Crescent Amusement Co., 323 U.S. 173, 186.

In short, mergers permanently change the competitive structure of the industry by eliminating competitors; approved cooperative working arrangements, on the other hand, leave the competitive structure intact, so that competitive conduct remains the rule except in the narrow area defined by the agreement.[2/] And the agreement must

2/ Structure refers to conditions in an industry which are relatively permanent or which change only slowly and which affect the way a firm in that industry operates--e.g., the number and size distribution of firms in the

be no more restrictive than necessary to serve the public interest, after balancing the competitive disadvantages against the asserted justifications. Federal Maritime Commission v. Svenska Amerika, supra.

The Commission, relying on the language of Section 15, and believing "that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate-fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge" (RD 36, p. 8),[3/] held that Section 15 extends to merger agreements as well as cooperative working arrangements.

---

market. Conduct or behavior, on the other hand, refer to the firm's acts and are usually alterable in relatively short periods of time--e.g., rate-making, pooling arrangements. See Kaysen and Turner, Antitrust Policy (1959), pp. 59-60; Areeda, Antitrust Analysis (1967), pp. 70-71.

3/ The only record reference in this brief will be to the Report of the Commission, dated October 3, 1967. This Report is listed as item 36 on the list of documents certified to the Court by the Assistant Secretary of the Commission and will be referred to herein as "RD 36".

Apparently it concluded that there is a presumption in favor of including mergers within its power to grant exemptions from the antitrust laws. For it held that neither the language nor the legislative history of Section 15 show that Congress intended to exclude mergers from the scope of the section (RD 36, p. 12).[4/] We submit that this stands the presumption against implied exceptions to the antitrust laws on its head.

4/ The Commission said: "[N]either the language of section 15 nor its legislative history show that Congress did not intend section 15 to cover agreements to merge." Ibid.

Apparently it concluded that there is a presumption in favor of including mergers within its power to grant exemptions from the antitrust laws. For it held that neither the language nor the legislative history of Section 11 show that Congress intended to exclude mergers from the scope of the section (CD 26, p. 127).4/ We submit that this stands the presumption against implied exemptions to the antitrust laws on its head.

4/ The Commission said: "Neither the language of Section 11 nor its legislative history indicates that Congress did not intend section 11 to apply to mergers." Ibid.

THE SHIPPING ACT DOES NOT AUTHORIZE THE COMMISSION TO APPROVE MERGERS AND THEREBY IMMUNIZE THEM FROM THE ANTITRUST LAWS

A. The Strong Presumption Against Implied Repeals of The Antitrust Laws Requires a Showing of an Unmistakable intention to Include Mergers

The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy * * *." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218; United States v. Philadelphia National Bank, 374 U.S. 321, 372. It has therefore emphasized that where Congress has carved out an exemption from the antitrust laws it will construe the exemption "strictly". United States v. McKesson & Robbins, 351 U.S. 305, 316; see Esso Standard Oil Co. v. Secatore's Inc., 246 F. 2d 17, 21 (C.A. 1). It will "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." California v. Federal Power Commission, 369 U.S. 482, 485. For the same reason, it will not "lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."

THE SHIPPING ACT DOES NOT AUTHORIZE THE COMMISSION TO APPROVE AGREEMENTS IMMUNIZED FROM THE ANTITRUST LAWS.

A. The Supreme Court Has [illegible] Limited Immunity of The Shipping Act [illegible] on the [illegible] Courts

The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy . . . ." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218; United States v. Philadelphia National Bank, 374 U.S. 321, 348. It has therefore emphasized that where Congress has enacted some exemption from the antitrust laws it will construe the exemption "strictly". [illegible] v. [illegible], [illegible] U.S. [illegible], and [illegible] [illegible], [illegible]. In [illegible] it said that Congress, having provided only a limited exemption from the antitrust laws, [illegible] [illegible] v. [illegible], [illegible] U.S. [illegible]. [illegible] was "highly [illegible] [illegible] [illegible] regulatory scheme [illegible] [illegible] the antitrust laws [illegible]

11

Carnation Co., *supra*, 383 U.S. at 318. "Repeals of the antitrust laws from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (Citations omitted.) *Philadelphia National Bank*, *supra*, 374 U.S. at 350-351.

Indeed, *Carnation*, *supra*, a Shipping Act case, is typical of the deep-seated reluctance to find repeals of the antitrust laws by implication. In that case, the implementation of rate-making agreements which had not been approved by the Maritime Commission, was found to have offended the Shipping Act as well as the antitrust laws. The Court refused to hold that the Shipping Act freed the shipping industry from the antitrust laws, notwithstanding the comprehensive pattern of regulation which that Act imposed upon the shipping industry and even though the conduct which offended the antitrust laws was remediable under the Shipping Act by a cease and desist order, by civil penalties of up to $1,000 a day for each day the violation continued (§15, 46 U.S.C. 814) and an award of reparations to the person injured by the violation (§22, 46 U.S.C. 821).

So, too, in the case of the banking industry. Philadelphia National Bank, 374 U.S. 321. Not only are banking operations subject to stringent and manifold governmental controls (id., at 327-330) but mergers, consolidations and acquisitions in particular are expressly authorized upon approval of the appropriate governmental agency. Furthermore, the agency is specifically directed to take into account the effect of the transaction on competition and to withhold its approval unless the transaction is found to be in the public interest (id., at 332-333). So profound is the attachment to competition as "our fundamental national economic policy" (id., at 372) that, without an express statutory provision clothing a merger with immunity, not even the agency's approval in an industry so pervasively regulated as banking was held to exempt the merger from Section 7 of the Clayton Act (15 U.S.C. 18).[5/]

The teaching of these cases is that the immunization of mergers from the antitrust laws must be found,

---

5/ See also the cases collected in Philadelphia National Bank, supra, 374 U.S. at 350, n. 28.

not in the silence of Congress, but in a statutory directive in plain and unmistakable terms. The same considerations that have led the Supreme Court in cases such as Philadelphia National Bank to refuse to imply an immunity as a result of the grant of some regulatory jurisdiction would be equally applicable in a situation such as that present here, i.e., where immunity would follow if jurisdiction had been granted. An ambiguity as to the scope of jurisdiction, all other things being equal, should be resolved against a grant of jurisdiction that accords the agency the exceptional power to immunize. Of course, if jurisdiction over merger transactions is necessarily implied or required by the regulatory scheme, the fact that immunization would follow from an exercise of such jurisdiction does not of itself require a narrow reading of the regulatory scheme. But, as we shall show, there is no such necessary implication. In fact, the evidence clearly points to a concern with transactions which fall short of mergers and which Congress believed would forestall the need for mergers.

B. The Statutory Language, Read in Context, Shows No Intention to Include Mergers.

Unlike the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Communications Commission (49 U.S.C. 5(2), 1378; 47 U.S.C. 221, 222), the Federal Maritime Commission has no express authority to approve mergers. The first paragraph of Section 15 of the Shipping Act confers jurisdiction upon the Commission over every agreement among persons subject to the Act:

> "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive preferential, or cooperative working arrangement . . ."

The Commission recognized that this provision grants no express authority to approve mergers. However, fastening upon the language with respect to an agreement "controlling, regulating, preventing, or destroying competition," the Commission held that an agreement for

merger is included. Viewed in context this is an impermissible reading. The type of agreement to which Section 15 is directed is a "cooperative working" agreement, not one which results in the immediate disappearance of one or more of the parties, but one which contemplates the continued existence of the parties as separate entities.

All the other clauses in the first paragraph of Section 15 refer to agreements providing for working arrangements between the parties. The first five, excluding the one on which the Commission relies, specify agreements which provide for the particular manner by which the parties will work together (e.g., fixing rates, giving special rates, allotting ports, etc.). The concluding clause is a catch-all description embracing agreements "in any manner providing for an exclusive, preferential or cooperative working arrangement." This concluding clause was obviously intended to characterize and define the agreements previously described, including agreements "controlling, regulating, preventing, or destroying competition." See, Virginia v. Tennessee,

148 U.S. 503, 519; Sutherland, Statutory Construction, 3rd Ed., § 4908. Since an agreement for merger is not an "exclusive, preferential or cooperative working arrangement," it is not included within Section 15. 5a/

Support for this reading is also provided by the two immediately following paragraphs of the original Section 15. The second paragraph authorizes the Commission to disapprove any agreement "whether or not previously approved" which it finds fails to meet the statutory criteria (App., *infra*, p.32) The third paragraph declares existing agreements to be lawful "until disapproved by" the Commission (*Ibid.*). Both paragraphs thus contemplate the type of agreements which will be susceptible of continuing supervision by the Commission so that the Commission may insure that agreements once approved as not detrimental to commerce, do not

---

5a/ A contemporaneous comment on the newly enacted Shipping Act describes Section 15 as covering "pooling, rate and other cooperative agreements * * * ." Current Legislation, Government Regulation of Private Shipping, 17 Col. L.R. 357, 358.

148 U.S. 503, 519; Sutherland, Statutory Construction, 3rd Ed., § 4920. [illegible] an agreement for merger is not an "exclusive, preferential or comparative working arrangement," it is [illegible] Section 13. 3c/

Support for this reading is also provided by the two immediately following paragraphs of the original Section 13. The second paragraph [illegible] to disapprove any agreement "heretofore or [illegible] approved" which [illegible] to meet the standards of [illegible], Supra, p.[illegible]. The third paragraph [illegible] agreements to be [illegible] "until [illegible]" by the Commission (ibid.). Both paragraphs [illegible] agreements [illegible] which will be [illegible] by the Commission [illegible] once approved as was [illegible].

3c/ A contemporaneous [illegible] [illegible]

become so by virtue of changing conditions or otherwise. Mergers, with their attendant problems of divestiture, do not lend themselves to this kind of treatment.

Volkswagenwerk v. Federal Maritime Commission, ____ U.S. ____, No. 69, decided March 6, 1968, also involved a question as to the scope of Section 15 of the Shipping Act. In that case, an association of persons subject to the Act had entered into an agreement for allocating among themselves a common expense. The agreement there, however, unlike the one here, was concededly a "cooperative working agreement" (slip op., p. 9). The Supreme Court, sustaining the position of the United States (slip op., p. 6), held that it was the kind of cooperative working agreement which was within the Commission's jurisdiction under Section 15 (slip op., pp. 9-16)

5b/ We note that the United States in that case expressed doubt that merger agreements are subject to the Commission's jurisdiction under Section 15 (Brief, p. 24).

C. The Legislative History Makes Clear That The Congress Did Not Intend to Include Mergers

The Shipping Act was passed following an exhaustive investigation of the shipping industry undertaken by the House Committee on Merchant Marine and Fisheries under the Chairmanship of Congressman Alexander. See Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 487-490; Volkswagen, supra, slip op., pp. 13-14. After extensive hearings, the Committee issued a lengthy report, known as the Alexander Report. 6/ The Report includes a questionnaire sent to the steamship lines in the American foreign trade which inquires into preferential or cooperative agreements and understandings with other lines or railroads (Report, pp. 13-14). The Report also describes in detail 80 steamship agreements and conference arrangements in the foreign trade (Id., pp. 21-280). What is striking about the agreements enumerated in the questionnaire and

---

6/ House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. Doc. No. 805, 63rd Cong., 2d Sess.

C. The [illegible] Hearings Before [illegible] That the [illegible] Defined by [illegible]

The [illegible] exhaustive investigation [illegible] by the House [illegible] under the Chairmanship of [illegible] tive [illegible] 487-490; [illegible] the [illegible] by the [illegible] known as the [illegible] before [illegible] the [illegible] above the [illegible]

[illegible]

the 80 agreements analyzed in the Report is that none refers to mergers or consolidations. All concern cooperative working arrangements: agreements to divide traffic or routes, to meet competition of other lines, to fix rates, to regulate sailings, etc. The focus of the Committee's concern, therefore, were the working arrangements among the lines in the American foreign trade--the virtues and vices of these relationships.

The Committee recommended against outlawing cooperative arrangements because it believed that their advantages outweighed their disadvantages. Otherwise rate wars would occur and result in the elimination of the weaker lines through failure or consolidations. The end result "would mean a monopoly fully as effective, and * * * more so, than can exist by virtue of an agreement." (Id., 416). This result could not be prevented by legislation, the Committee reported, but it could be forestalled by the lesser evil of "permitting the several lines * * * to cooperate through some form of rate and pooling arrangement under Government supervision and control." (Ibid.) Thus,

one reason for permitting cooperative agreements, in the committee's view, was that it was necessary to do so in order to forestall consolidations. It said (id., 416):

> These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control * * *. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States.

Thus, one of the major purposes of the Committee's report was to permit the minimum of anti-competitive behavior necessary to preserve a competitive structure in the industry by preventing the disappearance of independent firms. The Committee clearly did not intend to permit the legalization of mergers. It did intend to permit the legalization of cooperative arrangements, despite their

shortcomings, and one reason for doing so was that otherwise rate wars would result in the greater evil of eliminating many lines from the industry through failure or consolidation. 7/

In the light of this legislative history, it is apparent that the Commission was mistaken in its view that the considerations which led Congress to permit the legalization of working agreements apply equally to mergers and consolidations. As noted above, an important reason for doing so was that otherwise consolidations would unavoidably accelerate in pace and size, thus eliminating most lines from the industry. A second consideration was that secrecy was characteristic of cooperative arrangements (Alexander Report, pp. 293-295), and this was regarded as a serious disadvantage to shippers (Id., p. 307), a disadvantage which could be eliminated by requiring them to be filed with the government (Id., 311-313, 416). This consideration would obviously not apply to mergers because

---

7/ The recommendations of the Alexander Committee were adopted by the House and Senate Reports on the Shipping Act. See Volkswagenwerk, supra, slip op., p. 14, n. 25.

they cannot be kept secret. Third, unlike mergers, cooperative agreements are not permanent arrangements which eliminate all competition among the parties. While cooperative agreements may eliminate competition in rates and in certain other areas, there remain substantial areas of non-price competition, e.g. service and the processing of shippers' claims. 8/ Finally, cooperative agreements

---

8/ One textwriter has described intraconference competition as follows (Gorter, United States Shipping Policy, 1956, p. 146):

> If we assume, heriocally, that the members of a conference adhere strictly to their agreement, then they must compete with each other on a so-called nonprice basis. Better service would appear to be the principal inducement to offer to shippers in an effort to obtain their patronage. This means offering faster, more convenient schedules, and special facilities for cargo handling--e.g., refrigerated space. However, even speed may be ruled out as a competitive factor. In some conferences, rates have been geared to speed--the slower the vessel the lower the rates. Actually competition often goes beyond these theoretical confines. Violations of agreements occur and competition intrudes on rates. The abuses will persist so long as they are not flagrant or discovered by disadvantaged "clean" competitors. Such "shadings" of the rules are difficult to

are continuously subject to modification or disapproval; as noted (<u>supra</u>, p. 8), this safeguard cannot be applied in the case of mergers.

> eliminate in an arrangement based upon self-interest but calling for self-discipline. Competition among conference members is often intense, depending upon conditions in the trade. [Footnote omitted.]

See also Marx, <u>International Shipping Conferences</u> (1953), pp. 250-251.

are continuously subject to modification or disappearance; as noted (supra, p. [illegible]), this safeguard cannot be applied in the case of [illegible]

D. Other Manifestations of Congressional Intent Confirm That Congress Had No Intention of Including Mergers in Section 15.

Unlike the Shipping Act, at least three other statutes conferring authority to approve and immunize mergers grant this authority expressly and in unmistakable terms. The Interstate Commerce Act makes it lawful, with the approval of the Commission, "to consolidate or merge * * * [or] to acquire control * * *" (§5(2), 49 U.S.C. 5(2)) and relieves "from the operation of the antitrust laws" the transaction so approved (§5(11), 49 U.S.C. 5(11)). Similarly, the Federal Aviation Act makes it unlawful without approval of the Civil Aeronautics Board "to consolidate or merge * * * [or] to acquire control * * *" (§408, 49 U.S.C. 1378) and grants antitrust exemption for an approved transaction (§414, 49 U.S.C. 1384). The Federal Communications Act also speaks directly and in unmistakable language regarding consolidations, acquisitions and mergers and grants immunity for those approved by the Federal Communications Commission (§§ 221, 222, 47 U.S.C. 221,222).

The Maritime Commission believed that the explicit grant of authority in the case of the other regulatory agencies warrants no inference against a grant of authority to it, despite the absence of language in the Shipping Act dealing expressly with mergers. It reasoned that the Shipping Act was passed first and "granted the broadest possible authority over anticompetitive agreements * * *." (RD 36, p. 10). Accordingly, the "subsequent specificity could well reflect nothing more than a later stylistic preference in legislative draftmanship." (Ibid.)

With deference, we submit the Commission's refusal to give any weight to the later enactments is not warranted. In the first place, the Commission begs the question. Of course, Congress granted authority over anticompetitive agreements. The issue is whether the authority which Congress granted extended to agreements for merger and consolidation as well as to cooperative working agreements. In the second place, it may well be, as the Commission states, that the specificity in the other regulatory

statutes reflects a "stylistic preference." One would expect, however, that if this were the case, the legislative histories of the other enactments would indicate an intention to depart from the style assumed to have been preferred in the Shipping Act. Yet, none has been suggested. We submit that the explicit and direct treatment of mergers in the case of the other statutes is not a neutral fact, but is further evidence of a lack of intention to include mergers in the Shipping Act.

What is more, there are also statutes enacted prior to the passage of the Shipping Act which speak in distinct and unmistakable language to the problem of combinations involving ownership. Section 11 of the Panama Canal Act of 1912 (37 Stat. 560, 566, 49 U.S.C. 5(14)), which amended Section 5 of the Interstate Commerce Act, dealt with ownership or control of water carriers specifically. The amendment made it unlawful for any railroad "to own * * * control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier

by water operated through the Panama Canal or elsewhere" with which the railroad may compete. Section 7 of the Clayton Act, as originally enacted (38 Stat. 731), was plainly directed at control of corporate unifications. This, too, was enacted prior to the passage of the Shipping Act. The silence of the Shipping Act on mergers, following so closely upon these enactments, furnishes eloquent evidence that Congress had no intention to include mergers under the Shipping Act.

The relevance of the prior enactment of the Panama Canal Act is heightened by the fact that the Alexander Committee, which recommended passage of the Shipping Act, was fully aware of it. Indeed, the Committee in making its recommendations to Congress with respect to water carriers in the domestic trade, referred at length to the Panama Canal Act and specifically to Section 11, described above, which it said "go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States." (Alexander Report, p. 422.)

by water operated through the Panama Canal or else-
where" [illegible]. Section 7
of the [illegible] (39 Stat. 731),
was plainly [illegible] modifications.
This, [illegible] of the Ship-
ping Act. [illegible]
following [illegible]
eloquent [illegible]
include [illegible]

The [illegible] of the [illegible] Panama
Canal [illegible]
Coastwise [illegible] Shipping Act,
was [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

CONCLUSION

Section 15 of the Shipping Act does not empower the Maritime Commission to approve mergers and thereby to immunize them from the antitrust laws. Neither the language nor the legislative history show an intention to include agreements to merge or consolidate. On the contrary, the legislative history shows that Congress' concern was with cooperative agreements only and that it permitted such agreements, albeit under supervision, on the premise that it was necessary to do so in order to prevent the worse evil of destructive rate wars resulting in failures and corporate consolidations and the attendant permanent loss of competition in the shipping industry. This reading of Section 15 is confirmed by other evidence of Congressional intention and is further reinforced by the strong presumption against implied repeals of the antitrust laws.

The order of the Commission, insofar as it rests on the theory that the jurisdiction of the Commission

extends to mergers, should be set aside.

Respectfully submitted,

DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
IRWIN A. SEIBEL, Irwin A. Seibel
Attorneys,
Department of Justice.

APRIL 1968.

CERTIFICATE OF COMPLIANCE WITH
RULES 18 AND 19 OF THIS COURT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Irwin A. Seibel

IRWIN A. SEIBEL
Attorney, Department of Justice

APPENDIX

Section 15 of the Shipping Act, 1916, as originally enacted (39 Stat. 733-734), provides as follows:

> SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to

be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within Brief on behalf of the United States by mailing (first class regular mail) three copies thereof to counsel for the Federal Maritime Commission and to counsel for the Intervenors, both located in Washington, D.C., and by mailing (first class air mail) three copies thereof to counsel for petitioner, located in San Francisco.

Dated at Washington, D.C., this 15 day of April, 1968.

Irwin A. Seibel

Irwin A. Seibel